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Supreme Court of the United States

October Term, 1960

No. 660

BEN H. BROWN,

Petitioner,

v.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

THEODORE GARRIS,
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Supreme Court of the United States

October Term, 1960

No.

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BEN H. BROWN,

Petitioner,

v.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Ben H. Brown, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above case on October 21, 1960.

Citations to Opinions Below

The opinion of the New York County Surrogate's Court of the State of New York, printed at page 36 of the Record on appeal below, is reported in 240 Misc. 661, 124 N. Y. S. 2d 793.

The opinion of the Appellate Division of the Supreme Court of the State of New York, 1st Judicial Department, printed at page 52 of the Record on appeal below, is reported in 283 App. Div. 463, 128 N. Y. S. 2d 738.

There was no opinion in the Court of Appeals of the State of New York.

Jurisdiction

The Judgment of the Court of Appeals of the State of New York was entered October 21, 1960, and is printed in Appendix A hereto, *infra*, pp. 9-11. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

Questions Presented

1. Whether due process of law under the Fourteenth Amendment to the Constitution of the United States is denied to petitioner by reason of the application of the statutory provisions, set forth in Appendix B, to the New York bank accounts of a non-resident deceased whom petitioner represents as ancillary administrator, whereby petitioner is compelled to deliver said accounts to the State Comptroller.

2. Whether due process of law under the Fourteenth Amendment to the Constitution of the United States is denied to petitioner where bank accounts, inactive for more than fifteen years, which had been reduced to the possession of petitioner, the ancillary administrator of the estate of a non-resident deceased, are seized by the State of New York as abandoned property, there being no showing that the respective banks ever published any notices with respect to the said accounts.

3. Whether due process of law under the Fourteenth Amendment to the Constitution of the United States is denied to petitioner where bank accounts in his possession as ancillary administrator of the estate of a non-resident deceased, whose heirs are unknown, are escheated by the State of New York in a final accounting proceeding in which it appeared, and in which it did not in its answer or objections claim an escheat, and in which it gave no prior notice of its claimed right of escheat, the claim of escheat being raised for the first time in the Appellate Division of the State of New York.

4. Whether Sec. 600, par. 1(b) and Sec. 602, par. 2 of the Abandoned Property Law and Sec. 272 of the Surrogate's Court Act and the Appellate Division order and the decree entered thereon are void and unconstitutional, as denying due process of law under the Fourteenth Amendment to the Constitution of the United States, in that they compel delivery to the Comptroller of the State of New York of legacies of unknown persons by estate representatives and by the appellant without any requirement of notice.

Constitutional Provision, and New York Statutes Involved

The case involves the 14th Amendment to the Constitution of the United States; Abandoned Property Law, Sec. 300, subd 1(a); Abandoned Property Law, Sec. 302, subd. 1; Abandoned Property Law, Sec. 600, subd. 1(b); Abandoned Property Law, Sec. 602, subd. 2; Surrogate's Court Act, Sec. 272. The foregoing constitutional provision, and statutes are printed in Appendix B, *infra*, pp. 12-14.

Statement

Ike Menschefrend died on July 9, 1949, intestate, a resident of California for upwards of fourteen years prior to his death (11, 12, 23, 29, 30),* possessed of California property (28), and savings accounts in New York City banks. In September of 1949, the petitioner, Ben H. Brown, who was the Public Administrator of Los Angeles County, California, was appointed administrator of the estate of deceased in California (28), and on September 19, 1950, ancillary letters of administration were issued to petitioner by the Surrogate's Court of New York County (24). On

* References are to folios of the printed record on appeal to the Court of Appeals of the State of New York.

September 21, 1950, all three New York banks released the respective bank accounts to petitioner (95). All the bank accounts had been inactive for more than fifteen years prior to September 21, 1950 (95). The Estate was exempted from payment of a transfer tax on or about September 23, 1951 (39). Despite the exercise of due diligence, petitioner has been unable to ascertain the heirs and next of kin of the deceased (27, 28, 29, 30, 31, 32).

In the final accounting proceeding, petitioner requested that his accounts be settled (34) and that the net estate be transmitted to the domicile (35). The Attorney General of the State of New York appeared in the proceeding, and claimed that the net estate should be paid to the State Comptroller as abandoned property (96). There was no hearing in the Surrogate's Court, the matter being submitted on the filed papers, and the briefs of the parties.

The Surrogate overruled the contentions of the Attorney General, and made a decree directing that the net estate be paid to the domiciliary administrator (20). On appeal, the Appellate Division, First Department, made an order reversing the decree of the Surrogate (148-153), and upon such reversal, the Surrogate made a decree directing that the net estate be paid to the Comptroller of the State of New York (127-141). The latter decree of the Surrogate's Court was affirmed by the Court of Appeals of the State of New York (Appendix A).

The federal questions were first raised by the petitioner in the Court of Appeals of the State of New York. Pursuant to leave granted by such Court, petitioner served a brief raising constitutional questions. A certified copy thereof is submitted herewith. A copy of such brief is printed in Appendix C, *infra*, pp. 15-20.

It is believed that the raising of constitutional questions in the Court of Appeals was timely because petitioner was not deprived of any property until the Appellate Division

reversed the decree of the Surrogate, and petitioner was compelled to pay the funds in his possession to the State Comptroller. It is also believed that the questions presented herein are of such grave importance that they should be considered, regardless of when raised. *Mass. Nat. Bank* v. *Shinn*, 163 N. Y. 360.

Further, the judgment of the Court of Appeals of the State of New York (Appendix A) contains a recital that there were presented and necessarily passed upon questions under the Constitution of the United States. The judgment also contains a recital that the Court of Appeals held there was no violation of petitioner's constitutional rights under the Fourteenth Amendment. It is believed that since the Court of Appeals decided constitutional questions, this Court is not inclined to be concerned with the manner in which the questions were raised. *Whitney* v. *California*, 274 U. S. 357; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123; *Louisville & Nashville R. Co.* v. *Higdon*, 234 U. S. 592.

Reasons for Granting Writ

The holding of the lower appellate courts in the case at bar that New York may escheat, and take custody of the intangible bank accounts of a non-resident deceased, to the exclusion of the rights of the ancillary administrator, petitioner herein, of the domiciliary administrator, and of the domiciliary State, is one of very grave implications.

It is apparent that all non-residents now having bank accounts in New York, as well as non-residents' opening accounts there in the future, are directly affected by the holding in the case at bar. Necessarily affected are the respective States of domicile of such non-residents. Indeed, there is no question but that every State in the union is likely to be affected by the within holding. Unquestionably, foreign countries will feel the impact of such de-

cision. A good example is found in the case of *Matter of Turton*, 20 Misc. 2d 569, aff'd 9 A. D. 2d 759, rev'd 8 N. Y. 2d 311. In that case the Government of British Honduras had to appeal all the way to the Court of Appeals of the State of New York before winning the right to intervene in a Surrogate's Court matter involving the estate of a Honduras resident who died without heirs, possessed of intangible personal property in New York, all of which was claimed by New York who relied on the decision of the lower appellate courts in the case at bar, and who opposed the right of Honduras to intervene.

Furthermore, during the course of the litigation herein, the Attorney General of the State of New York, in his briefs to the respective courts below, argued that this was essentially a dispute between New York and California as to which of the two States should escheat the property in question. The Court of Appeals of the State of New York, and the Appellate Division of the State of New York both ruled that New York should prevail. Final resolution of a dispute between the two States should be made by this Court.

It is further believed that the questions presented herein are bound to come up time and time again in other States; that the question will be presented whether the State in which the personal property is found should escheat the same, or whether the State of domicile should do so; that the question will be presented as to whether the State in which the personal property is found should take custody of the same under an Abandoned Property Law providing for the lodging of custody of abandoned property in such State, or whether the State of domicile should obtain custody. It is believed that a final decision by this Court would be of great value in settling the conflicting rights between the various States whenever questions are presented such as the ones in the case at bar.

Furthermore, it is believed that the questions presented herein are of a substantial nature, and that they have not heretofore been passed upon by this Court. In *Anderson National Bank* v. *Luckett*, 321 U. S. 233, the Court upheld the constitutionality of the abandoned property law of the State of Kentucky, which had been attacked by a national bank under the due process clause of the Fourteenth Amendment to the Constitution of the United States. That case is readily distinguishable from the case at bar inasmuch as there was no question presented there as to the seizing of the property of a non-resident, such as is presented here.

Another reason for granting certiorari is that this Court, in the case of *Connecticut Mutual Life Insurance Company* v. *Moore*, 333 U. S. 541, while it upheld the constitutionality of the New York Abandoned Property Law as applied to policies of life insurance issued for delivery in New York on the lives of New York residents, expressly refused to rule on the validity of such law in instances where the assured, and the beneficiaries were non-residents at the time of maturity of the policies. In the case at bar, there is a real dispute directly involving a deceased non-resident. This Court now has the opportunity of ruling on the constitutionality of the New York Abandoned Property Law insofar as same relates to the bank accounts of non-residents. A ruling by this Court would be of great value in settling the law insofar as non-residents are concerned, and insofar as the rights of the domiciliary State are concerned.

Finally, it is believed that the ruling of the Appellate Division of the State of New York, and the affirmance thereof by the Court of Appeals of the State of New York, are erroneous. We believe that the lower appellate courts failed to appreciate the significance of the fact of the non-residence of the deceased, Ike Menschefreni. In the case of *Connecticut Mutual Life Insurance Company* v. *Moore*, 333 U. S. 541, this Court ruled that New York had sufficient

contacts with the transaction in question to justify the seizure of abandoned monies due its residents. Applying the test laid down by this Court, we believe that the State of New York had insufficient contacts with the transaction in question to justify its seizure of the bank accounts of the deceased non-resident.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

THEODORE GARRIS,
Counsel for Petitioner.

January 16, 1961.

Appendix A

Judgment

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 21st day of October, in the year of our Lord one thousand nine hundred and sixty, before the Judges of said Court.

Witness:

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON,
Clerk.

Remittitur October 21, 1960

In the Matter of the Judicial Settlement of the Account of Proceedings of Ben H. Brown, as Ancillary Administrator of Ike Menschefrend, &c., Deceased.

BEN H. BROWN,

Appellant,

NATHANIEL H. GOLDSTEIN, Attorney General of the State of New York,

Respondent.

BE IT REMEMBERED, That on the 10th day of May, in the year of our Lord one thousand nine hundred and sixty, Ben H. Brown, the appellant in this cause, came here unto the Court of Appeals, by Theodore Garris, his attorney, and filed in the said Court a Notice of Appeal and return

thereto from the decree of the Surrogate's Court, New York County. And Nathaniel H. Goldstein, Attorney General of the State of New York, the respondent in said cause, afterwards appeared in said Court of Appeals by the present Attorney General, Louis J. Lefkowitz.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Theodore Garris, of counsel for the appellant, and by Mr. Daniel M. Cohen, of counsel for the respondent, and after deliberation had thereon, did order and adjudge that the decree of the Surrogates' Court entered upon the order of the Appellate Division appealed from herein be and the same hereby is affirmed, with costs to all parties appearing separately and filing separate briefs payable out of the bank funds. And thereafter a motion to amend this remittitur having been granted this remittitur is hereby amended by adding thereto, the following: There were presented and necessarily passed upon questions under the Constitution of the United States, *viz.*: Whether § 600, paragraph 1 (b) of the Abandoned Property Law and § 272 of the Surrogate's Act—and the Appellate Division order and the decree entered thereon are void and unconstitutional, as denying due process of law under the Fourteenth Amendment, in that they compel delivery to the Comptroller of the State of New York of legacies of unknown persons by estate representatives and by the appellant without any requirement of notice. The Court of Appeals held that there was no violation of appellant's constitutional rights under the Fourteenth Amendment.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogates' Court, New York County, there to be proceeded upon according to law.

THEREFORE, it is considered that the said decree entered upon the order of the Appellate Division be affirmed, with costs &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Surrogate's Court, before the Surrogates thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, October 21, 1960.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON,
Clerk.

[SEAL]

Appendix B

Fourteenth Amendment to the Constitution of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *.

Abandoned Property Law, Sec. 300, Subd. 1 (a)

Sec. 300. *Unclaimed property held or owing by banking organizations.*

1. The following unclaimed property held or owing by banking organizations shall be deemed abandoned property:

(a) Any amounts due on deposits or any amounts to which a shareholder of a savings and loan association or a credit union is entitled to, held or owing by a banking organization, which shall have remained unclaimed for fifteen years by the person or persons appearing to be entitled thereto, including any interest or dividends credited thereon, excepting

(i) any such amount which has been reduced or increased, exclusive of dividend or interest payment, within fifteen years, or

(ii) any such amount which is represented by a passbook not in the possession of the banking organization, which has been presented for entry of dividend or interest credit within fifteen years, or

(iii) any such amount with respect to which the banking organization has on file written evidence received within fifteen years that the person or persons appearing to be entitled to such amounts had knowledge thereof or

(iv) any such amount payable only at or by a branch office located in a foreign country.

ABANDONED PROPERTY LAW, SEC. 302, SUBD. 1

SEC. 302. *Publication of list of abandoned property.*

1. Within thirty days after making a report of abandoned property pursuant to the provisions of section three hundred one, such banking organization shall cause to be published a notice entitled: "NOTICE OF NAMES OF PERSONS APPEARING AS OWNERS OF CERTAIN UNCLAIMED PROPERTY HELD BY (~~name of~~ banking organization)."

ABANDONED PROPERTY LAW, SEC. 600, SUBD. 1 (b)

SEC. 600. *Unclaimed or unknown owner court funds.*

1. The following unclaimed property shall be deemed abandoned property:

* * *

(b) Any legacy or distribution share to which an unknown person is entitled, as specified in section two hundred seventy-two of the surrogate's court act;

ABANDONED PROPERTY LAW, SEC. 602, SUBD. 2

SEC. 602. *Payment of abandoned property.*

* * *

2. Within thirty days after a decree as provided by section two hundred seventy-two of the surrogate's court

act, the executor, administrator, guardian or testamentary trustee shall pay or deliver to the state comptroller all abandoned property specified in section six hundred, paragraph (b).

SURROGATE'S COURT ACT, SEC. 272

Sec. 272. *Legacy to unknown person to be paid to the comptroller.*

Where the person entitled to a legacy or distributive share is unknown, the decree must direct the executor, administrator, guardian or testamentary trustee to pay the amount thereof to the comptroller of the state, for the benefit of the person or persons who may thereafter appear to be entitled thereto * * *.

Appendix C

PETITIONER-APPELLANTS REPLY BRIEF

COURT OF APPEALS

STATE OF NEW YORK

No. 185

In the Matter of the Judicial Settlement of the Account of Proceedings of BEN H. BROWN, as Ancillary Administrator of IKE MENSCHEFREND, also known as I. MENSCHEFREND, IKE MENSCHFRID, IKE MENSCHFRIED, and as IKE MENSCHFIELD, Deceased.

BEN H. BROWN,

Petitioner-Appellant,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (substituted for NATHANIEL L. GOLDSTEIN, former Attorney General of the State of New York),

Respondent-Respondent.

The within brief is submitted on behalf of the appellant in reply to the brief of the Attorney-General.

1. ANSWERING THE ARGUMENT THAT THE BANK ACCOUNTS ESCHEATED TO THE STATE OF NEW YORK.

The Appellate Division, in its opinion below, adopted this argument of the Attorney General, and held that the bank accounts in question escheated to the State.

It is to be noted that the proceedings involved on this appeal are simply final accounting proceedings of an an-

ciliary administrator in the Surrogate's Court; that there were no escheat proceedings in the Surrogate's Court, or anywhere else, with respect to the instant bank accounts; that the State in its answer, and objections in the Surrogate's Court never claimed an escheat, but simply demanded custody of the said accounts under the Abandoned Property Law; that the State never served anyone with any kind of notice advising of its intention to escheat said accounts.

In support of his argument of escheat, the Attorney General, among other cases, cites the following: *Christianson* v. *Kings County*, 239 U. S. 356 (escheat of land); *Standard Oil Company* v. *New Jersey*, 341 U. S. 428 (escheat of stock and dividends of a domestic corporation). In both these cases, the Supreme Court upheld escheat statutes as constitutional, ruling that the requirements of due process had been satisfied. In both of said cases, a detailed procedure for escheat was provided for in a judicial proceeding. In each case, adequate notice was given to the interested parties.

In the case at bar, there was never any escheat proceeding; there was never any notice of an escheat proceeding. Escheat, in the case at bar, unlike the cited cases, was not adjudicated in court upon a hearing after due notice, but was simply declared by the lower Appellate Court to exist.

The prime requisite of due process of law is the opportunity to be heard. *Grannis* v. *Ordean*, 234 U. S. 385. This requires a hearing, and some form of notice thereof, both of which are lacking in the case at bar. See *The State of New Jersey by Van Riper* v. *The American Sugar Refining Company*, 20 N. J. 286, 119 A. 2d 767, upholding an escheat law, under which the State commenced an escheat proceeding, and holding the requirements of sufficient notice were complied with.

Appendix C

The foregoing cases further illustrate that an escheat cannot be presumed, but must be proven by the State in a special proceeding brought for such purpose. *Re Rapoport*, 173 Mich. 291.

We respectfully submit that in view of the absence of any escheat proceeding, or of notice thereof, in the case at bar, the order of the Appellate Division, and the decree entered thereon, are void and unconstitutional, in that they deprive the deceased, the appellant administrator, and the domiciliary administrator, of property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

2. Answering the argument that custody of the bank accounts should be retained by the State pursuant to the Abandoned Property Law.

The Attorney General places much reliance on *Anderson National Bank* v. *Luckett*, 321 U. S. 233. In that case, a Kentucky statute provided that unclaimed bank deposits be lodged with the State, to be kept in its custody. The Court upheld the constitutionality of the statute which had been assailed as denying due process to the bank.

The statute involved provided for notice to depositors by requiring that such notice be posted at the courthouse. It was held by the Court that such notice was a sufficient compliance with the requirements of due process, the Court stating that if the notice had been insufficient, there would be a denial of due process.

In the case at bar, the Appellate Division agreed with the contention of the Attorney General that the State should retain the said accounts pursuant to the Abandoned Property Law.

Section 302 of the Abandoned Property Law requires that a list of unclaimed accounts shall be published by banks in the newspapers at prescribed times.

Undoubtedly, the main reason for the said section is to afford notice to depositors in order that the requirements of due process may be met.

In the *Anderson National Bank* v. *Luckett* case, *supra*, it affirmatively appeared that the required posting of notices had been complied with.

In the case at bar, however, the record is barren of any fact to show that the respective banks ever published any notice with respect to the deceased, or to his bank accounts. The answer of the Attorney General nowhere claims that publication in newspapers took place.

Since the Attorney General invoked the Abandoned Property law as justification for seizing the said accounts, we believe it was his burden to show that the accounts were abandoned, and further, that the requirements of due process were met, by the giving of the statutory notices. This he failed to do.

We respectfully submit that the order of the Appellate Division, and the decree entered thereon, are void and unconstitutional, and they deprived the deceased, the appellant, and the domiciliary administrator of property, without due process of law, in violation of the 14th Amendment of the Constitution of the United States, in that the State seized custody of the said accounts without proof of compliance with Sec. 302 of the Abandoned Property Law, and without notice of any kind.

It is also respectfully submitted that Sec. 600, par. 1(b) of the Abandoned Property Law, and Sec. 272 of the Surrogate's Court Act and the said Appellate Division order, and said decree are void and unconstitutional, as denying due process under said 14th Amendment, in that they compel delivery to the Comptroller of legacies of unknown persons, by Estate representatives, and by the appellant, without any requirement of notice whatsoever.

By reason of the lack of due notices, hereinabove referred to, there is danger that the appellant, in another jurisdiction, might be compelled to make payment again to lawful claimants.

Although Sec. 1401 of the Abandoned Property Law requires the Comptroller to keep a public record of the names of owners of abandoned funds, and Sec. 1402 of such law requires him to publish the names of such persons in the State Bulletin, these provisions of the law do not constitute due process, since the said notices are given after the seizure has taken place.

3. Answering the argument that bank accounts of a non-resident may be taken into custody by the State pursuant to the Abandoned Property Law.

In *Connecticut Mutual Life Insurance Company* v. *Moore*, 333 U. S. 541, the Supreme Court of the United States upheld the validity of the New York Abandoned Property Law as applied to policies of insurance issued for delivery in New York on the lives of residents of New York. It specifically declined to rule on the validity of said law in instances where the insured person, after delivery of the policy, ceased to be a resident of New York, or where the beneficiary was not a resident of New York at the maturity of the policy.

The rationale of the decision is that the State of New York had sufficient contacts with the transactions in question to justify the seizure of abandoned monies due its residents.

In the court below, the Supreme Court of New York County, 187 Misc. 1004, 65 N. Y. Supp. 2d 143, ruled that the Abandoned Property Law was unconstitutional in so far as it applied to policies of life insurance issued for delivery outside of New York, by foreign life insurance companies. The State of New York did not appeal from this ruling.

Appendix C

We respectfully submit that the holding in the foregoing case, both in the Supreme Court of New York County, and in the Supreme Court of the United States, serves to indicate that the question of residence, or non-residence is an important consideration in determining the constitutionality, as well as the proper interpretation of the Abandoned Property Law. Applying the test laid down by the Supreme Court of the United States, and by the Court of Appeals in its decision of said case, we believe that New York had insufficient contacts with the transaction in question. The only contact between the State and the deceased would appear to be that the non-resident deceased opened bank accounts in New York many years ago. All of the deceased's subsequent contacts were with the State of California where he resided for many years until his death there.

We believe that on the facts of the case at bar, the Abandoned Property Law should be held inapplicable to bank accounts of non-residents. However, if the Court construes said law as authorizing the seizure of the bank accounts in question, we respectfully submit, for the reasons hereinabove mentioned, that such seizure constitutes a denial of due process of law.

Respectfully submitted,

THEODORE GARRIS,
Attorney for Petitioner-Appellant.

FILE COPY

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JAMES R. BROWNING, Clerk

IN THE

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OCTOBER TERM, 1960

No. 660

BEN H. BROWN,

Petitioner,

against

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Cases Cited

Bakerman, Matter of, 268 App. Div. 21, 26 (1st Dept., 1944), aff'd 295 N. Y. 811 (1946)	2
Barnett, Re (1902), 1 Ch. 847, 3 B.R.C. 198	8
Bell, Estate of (1908), 52 Sol. J. (Eng.), 600	8
California v. Michigan State Board of Escheats, 332 U. S. 764 (1947)	8
Lyons' Estate, In re, 175 Wash. 115, 26 P. 2d 915 (1933)	9
Maldonado, Estate of (1953), 2 All Eng. 1579 (C. A.)	9
Miner, Estate of, 143 Cal. 194, 198, 207, 76 Pac. 968 (1904)	9
Musurus, Estate of (1936), 2 All Eng. 1666, 80 Sol. J. 637	8

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Provident Savings Institution v. Malone, 221 U. S. 660 (1911) .....

Rapoport, Re, 317 Mich. 291, 26 N. W. 2d 777 (1947), cert. den. sub nom. California v. Michigan State Board of Escheats, 332 U. S. 764 (1947) 8

Securities Savings Bank v. California, 263 U. S. 282 (1923) .....

TEXTS CITED

2 Beale, Conflict of Laws (1935):

§ 303.2, pp. 1031-1032 .....

§ 309.1, pp. 1039-1040 8

Goodrich, Conflict of Laws (3d Ed., 1949):

§ 181, p. 539 .....

STATUTES CITED

New York Abandoned Property Law:

§ 600 4

New York Surrogate's Court Act:

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the respondent, the Attorney General of the State of New York, *pro se*, and opposes the petition herein and asks that it be denied.

New York Court Opinions

In the New York courts, this case is reported at 204 Misc. 661 (Surr. Ct., N. Y. Co.) 124 N.Y.S. 2d 793 (1953); reversed, 283 App. Div. 463 (1st Dept.), 128 N.Y.S. 2d 738 (1954); aff'd 8 N. Y. 2d 1093 (1960).

Preliminary Facts

Ike Menschefrend died on July 9, 1949, intestate, allegedly a resident of California, possessed of three savings accounts in New York City banks, in addition to substantial property in California. In September, 1949, the petitioner, who was then the Public Administrator of Los Angeles County, California, was appointed administrator of the decedent's California estate. Then, without the notice to the New York Attorney General required by New York law (*Matter of Bakerman*, 268 App. Div. 21, 26 [1st Dept., 1944], aff'd 295 N. Y. 811 [1946]), he procured ancillary letters of administration from the Surrogate's Court of New York County (24).

Upon the basis of the ancillary letters issued by the New York Surrogate's Court, all three savings accounts were released to the petitioner. In a *pro forma* proceeding, the New York estate was exempted from payment of any New York transfer tax on or about September 23, 1951 (39).

As ancillary administrator of the New York estate, the petitioner did not issue any citation to the New York Attorney General until he sought judicial approval of his accounts by the New York County Surrogate (26). The Surrogate then issued his *citation* dated October 6, 1952, returnable November 18, 1952, to all parties *designated by the petitioner* as proper parties to the proceeding (24-25, 80-86).

The Citation in the Accounting Proceeding

This citation dated October 6, 1952, was issued not only to the Attorney General, but also to the California Attorney General and "all heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, lienors, trustees, executors, administrators and successors in interest" of the decedent; and "if they, or any of them be dead, the

respective heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees executors, administrators and successors in interest of the aforesaid persons, all of whom and whose names and places of residence" were stated (in the citation) to be "unknown to the petitioner, and cannot be ascertained after due diligence, being the persons interested as creditors, legatees, devisees, beneficiaries, distributees, or otherwise" in the estate of the decedent, whose last-known address in Los Angeles, California, was set forth (81-86).

Service of the Citation

The citation, by direction of the New York Surrogate, dated October 6, 1952 was served *by mail* on the Attorney General of California and was published in two newspapers. (See Appendix A.) The petitioner's attorney, by his affidavit dated June 30, 1953, filed, in support of his petition, proof of such service and due publication of the citation in the manner prescribed by sections 55 and 60 of the Surrogate's Court Act. (See Appendix B.)

Accounting Proceedings Before the Surrogate

In the *petition* for settlement of his accounts, it was revealed, for the first time, that the petitioner had, despite due diligence, been unable to find any trace of any heirs or next of kin of the decedent (27, 32, 51-53, 68-69). He asked that his accounts be settled and that the net estate be paid to himself, as domiciliary administrator (35).

The New York Attorney General then appeared in the accounting proceeding in response to the citation; and, apprised of decedent's intestacy and the petitioner's allegations that the decedent had left no known heirs (31-32), opposed the transmission to California of the net estate, left in New York by the decedent (96). The California

Attorney General did not appear in the case, even though he had been served with the citation (Appendix B).

No hearing was requested of the Surrogate by either the petitioner or the Attorney General with relation to the issues presented by the petition and answer..

The Surrogate directed that the net estate be paid to the petitioner, as domiciliary administrator. He held inapplicable Surrogate's Court Act, § 272, which requires payment to the State Comptroller "for the benefit of the person or persons who may thereafter appear to be entitled thereto" of any distributive share of an estate where "the person entitled" is unknown (20). The Surrogate held the domiciliary administrator to be a "person entitled" under § 272 (107).

The Appellate Division Opinion

The Appellate Division reversed the Surrogate's decree, holding unanimously that the petitioner was *not* a "person entitled" within the meaning of Surrogate's Court Act, § 272. The Court construed the New York statute in its use of the words "person entitled" to refer only to "one entitled to succeed to the estate of the decedent, not one who is entitled to administer the estate" (172).

The Appellate Division observed that, under the terms of Surrogate's Court Act, § 272 and Abandoned Property Law, § 600, it would have concluded that the decedent's accounts in New York Banks would constitute abandoned property under the New York Law, if he had been a New York domiciliary (169-173). It then examined the New York Law of "distribution of estates" to ascertain whether that law required that custody of the accounts should be turned over to the domiciliary administrator, instead of to the New York State Comptroller because the intestate had not been a New York domiciliary (173).

The Appellate Division concluded that the New York law of distribution of estates did not require such transmission (174-187). It examined the provisions of Surrogate's Court Act, § 164, and noted that although that section ordinarily required transmission of an ancillary estate, located here, to the domiciliary estate for distribution according to its law, those provisions were applicable only where property of the decedent was to pass "by succession" (174); and that Section 164 was inapplicable where no property of the decedent was to pass "by succession" by reason of the absence of heirs (187).

Surrogate's Court Act, § 164, was construed not to require transmission "especially if the law of escheat recognized a local situs for these New York funds rather than a situs of domicile as in the case of ordinary intestate succession" (175). The Appellate Division noted that in the escheat cases, no "sucession" of estates was involved; that the property, being left without an owner, was "property at large or *bona vacantia*", deemed property of the sovereign, wherever found; and "the sovereign recognized no situs but its own" (176-177). In substance, then, the Appellate Division construed the law of escheat to recognize the *local situs* of bank accounts where the death of an intestate without heirs prevented their passing "by succession" (176-187).

Remission to the Surrogate's Court

The Appellate Division, upon reversal of the Surrogate, remitted the matter to him for further proceedings to ascertain whether the decedent's California funds were sufficient to meet all claims of creditors and administration expenses and to ascertain whether there was any claim that any tax problem was involved. The Court noted that it had assumed that the California funds were sufficient to meet all such claims (187-188).

Upon settlement of the decree of reversal before the Surrogate, the petitioner conceded the correctness of the assumptions made by the Appellate Division; and conceded the sufficiency of the California funds to meet all claims against them (144-146).

No claim was made by petitioner upon the remission to the Surrogate that the Appellate Division order of reversal constituted a violation of anyone's federal constitutional rights. On the contrary, the petitioner stated that he did not intend to apply to the Surrogate for further proceedings; and urged the Surrogate to enter a decree which would "not contain any provision for further proceedings" (146).

Such a decree was, accordingly, entered on June 23, 1954 (138); and the petitioner was directed to pay over to the New York State Comptroller the balance of the estate (140). The Surrogate's order was obeyed by the petitioner. On or about July 24, 1954, he paid over to the Comptroller the sum of $8,564.07.

In the Court of Appeals

An appeal was taken by the petitioner to the New York Court of Appeals from the order of the Appellate Division reversing the Surrogate and from the Surrogate's decree entered upon the order of reversal (115-124). But prosecution of the appeal was delayed by the petitioner and no brief was submitted by the petitioner in support of his appeal until February, 1959.

Not until the oral argument of petitioner's appeal in the Court of Appeals on October 6, 1960 did petitioner raise any federal constitutional question in this proceeding. The Court of Appeals granted him permission to file a reply brief, incorporating his constitutional objections. Pursuant to such permission, he filed with the Court of Appeals the reply brief designated as Appendix C to his petition (pp. 15-20).

The Court of Appeals wrote no opinion, but unanimously affirmed the decree entered upon the Appellate Division order. It thereafter granted the petitioner's motion to amend its remittitur to indicate that it had passed upon the constitutional questions presented by the petitioner—that Abandoned Property Law, § 600, paragraph 1 (b) and Surrogate's Court Act, § 272 and the Appellate Division order and decree entered thereon were void, and unconstitutional, as denying due process under the Fourteenth Amendment—and that it had held that there was no violation of petitioner's rights under that Amendment (Appendix A to petition; pp. 9-11).

Reasons for Denying the Writ

1.

The alleged constitutional questions presented by the petition were belatedly raised. Not until oral argument in the Court of Appeals did the petitioner suggest to the New York courts the existence of any federal constitutional question.

2.

The petition completely ignores the existence in the New York Surrogate's Court Act of provisions assuring the giving of adequate notice of proceedings pending in that Court to persons interested in those proceedings. Surrogate's Court Act, §§ 55-62.

3.

This proceeding was instituted by the petitioner himself. He certainly had notice of its pendency and has had a full opportunity to assert his claim to the fund before the New York Courts. He certainly has not lacked notice of these proceedings or been uninformed as to their disposition. Indeed, his own attorney subscribed to the affidavit of regularity required by the New York Surrogate, and by which the petitioner sought to obtain approval of his peti

tion to settle his accounts, upon the representation made by the petitioner and his attorney that proper notice had been given to any persons that might be interested in the estate, in accordance with the requirements of Surrogate's Court Act, §§ 55, 56, 57-a, 58-a, 59 and 60 (see Appendix A).

4.

The Attorney General of California had notice of the petitioner's application to settle his accounts and did not choose to appear in the proceeding. The status of the *petitioner* to raise the constitutional questions presented upon behalf of the decedent's alleged "unknown heirs" may be subject to some doubt. But even if there were no such doubt, the New York Surrogate's Court Act expressly places upon the New York State Comptroller, all custodial responsibility for the holding of funds belonging to unknown persons. Surrogate's Court Act, § 272.

5.

In a similar situation, involving a claim by the petitioner to a bank account left in Michigan by a California decedent, who died intestate and without heirs, this Court denied certiorari even though the Michigan courts had directed that the bank account, as well as certain bonds and stocks left with a Detroit bank for safekeeping, be turned over to the Michigan State Board of Escheats, as an escheated estate. *Re Rapoport*, 317 Mich. 291, 26 N. W. 2d 777 (1947), cert. den. sub nom. *California* v. *Michigan State Board of Escheats*, 332 U. S. 764 (1947).

6.

Bona vacantia are subject to control by the sovereign in whose jurisdiction they are found. Goodrich, *Conflict of Laws* (3d Ed., 1949), § 181, p. 539; 2 Beale, *Conflict of Laws* (1935), § 303.2, pp. 1031-2; § 309.4, pp. 1052-1060. See also *Re Barnett*, (1902) 1 Ch. 847, 3 B.R.C. 198; *Estate of Bell* (1908), 52 Sol. J. (Eng.), 600; *Estate of Musurus*

(1936), 2 All Eng. 1666, 80 Sol. J. 637; *Estate of Maldonado* (1953), 2 All Eng. 1579 (C. A.).

But even if this case involved an absolute escheat and even if petitioner were assumed to represent the sovereign interests of California, petitioner's position here would have to be regarded as inconsistent even with some basic California law. For it has been recognized in California that escheat does not involve a succession to property, but the opposite of succession. *Estate of Miner*, 143 Cal. 194, 198, 207, 76 Pac. 968 (1904).

An isolated decision, contrary to the general property rule set forth in this subdivision as to *bona vacantia* was announced in *In re Lyons' Estate*, 175 Wash. 115, 26 P. 2d 915 (1933). The *Lyons* decision was criticized by Professor Beale (2 BEALE, op. cit., § 309.1, p. 1039); and in the *Rapoport* case (*supra*), in which this Court refused to grant a writ of certiorari, Michigan declined to follow the *Lyons* decision.

7.

This Court has recognized that bank accounts have a *situs* where a bank has its place of business. *Security Savings Bank* v. *California*, 263 U. S. 282 (1923). The state in which the bank is located was there held to have the same dominion over such intangible property located within its borders as it has over tangible property. As in *Provident Savings Institution* v. *Malone*, 221 U. S. 660 (1910), this Court held in the *Security Savings Bank* case, that the due process clause was not violated by a law requiring a bank to pay over to the state, as depositary, savings deposits which had long remained unclaimed in banks located within the state. Procedural, as well as substantive, aspects of the due process argument were there considered and rejected (263 U. S. at pp. 286-290).

CONCLUSION

The writ of certiorari petitioned for should be denied.

Dated: New York, N. Y.
February 24, 1961.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney Pro se
80 Centre Street
New York 13, New York

PAXTON BLAIR
Solicitor General

DANIEL M. COHEN
Assistant Attorney General
of Counsel.

APPENDIX A

Order of Publication

At the Surrogate's Court of the County of New York, at the Hall of Records in said county, on the 6th day of October, in the year one thousand nine hundred and fifty-two.

Present: HONORABLE WILLIAM T. COLLINS, Surrogate.

IN THE MATTER OF THE JUDICIAL SETTLEMENT OF THE ACCOUNT OF PROCEEDINGS OF BEN H. BROWN, as Ancillary Administrator of IKE MENSCHEFREND, also known as I. MENSCHEFREND, IKE MENSCHFRID, IKE MENSCHFRIED, and as IKE MENSCHFIELD, Deceased.	ORDER OF PUBLICATION (Accounting)

Upon filing the verified petition of Ben H. Brown, as Ancillary Administrator of Ike Menschefrend, also known sa I. Menschefrend, Ike Menschfrid, Ike Menschfried, and as I. Menschefrend, Ike Menschfrid, Ike Menschfried, and Angeles, California, by which the petitioner has made proof to my satisfaction that Attorney General of the State of California, Library and Courts Building, Sacramento, California, is a person interested in this proceeding and that he is not a resident of this state, and that personal service of the citation herein cannot with due diligence be made upon him within the state, and by which said petition the petitioner has also made proof to my satisfaction that there are other persons whose residences are unknown or whose names and places of residence are unknown and cannot after diligent inquiry be ascertained by the petitioner, to wit, All heirs at law, next of kin, devisees

legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of Ike Menschefrend, also known as I. Menschefrend, Ike Menschfrid, Ike Menschfried, and as Ike Menschfield, Deceased, and if they, or any of them be dead, the respective heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of the aforesaid persons, all of whom, and whose names and places of residence are unknown to the petitioner, and cannot be ascertained after due diligence.

Now, on motion of Theodore Garris of counsel for the said Ben H. Brown, petitioner,

ORDERED: That the service of the citation in the above-entitled matter upon the aforesaid persons be made by publication thereof in two newspapers, to wit: in the New York Law Journal published in the County of New York and in the New York Enquirer, published in the County of New York, once a week for four successive weeks; or, at the option of the petitioner, by delivering a copy of the citation to the above-named persons, in person without the state.

AND IS IS FURTHER ORDERED AND DIRECTED, That on or before the day of the first publication, the petitioner deposit in any post office in the State of New York 1 copy of the citation, each contained in a securely closed postpaid wrapper, directed to the following person respectively, at the place designated below: Attorney General of the State of California, Library and Courts Building, Sacramento, California.

AND IT IS FURTHER ORDERED, That service of citation in the above-entitled matter upon those persons whose resi-

dences are unknown or whose names and places of residence are unknown and cannot after diligent inquiry be ascertained by the petitioner herein, to wit: All heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of Ike Menschefrend, also known as I. Menschefrend, Ike Menschfrid, Ike Menschfried, and as Ike Menschfield, Deceased, and if they, or any of them be dead, the respective heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of the aforesaid persons, all of whom, and whose names and places of residence are unknown to the petitioner, and cannot be ascertained after due diligence be made by publication thereof in two newspapers, to wit: in the New York Law Journal, published in the County of New York, and in the New York Enquirer published in the County of New York, once a week for four successive weeks; or, at the option of the petitioner, by delivering a copy of the citation to the above-named persons in person without the state.

And I, being satisfied by the said petition that the petitioner cannot with reasonable diligence ascertain a place or places where the said persons hereinabove mentioned would probably receive matter transmitted through the post-office, hereby dispense with the deposit of any papers therein.

W. T. C.,
Surrogate.

APPENDIX B

Affidavit of Regularity

SURROGATE'S COURT,
COUNTY OF NEW YORK.

IN THE MATTER OF the Judicial settlement of the Account of Proceedings of BEN H. BROWN, as Ancillary Administrator of IKE MENSCHEFREND, also known as I. MENSCHEFREND, IKE MENSCHFRID, IKE MENSCHFRIED, and as IKE MENSCHFIELD, Deceased.	AFFIDAVIT OF REGULARITY

STATE AND COUNTY OF NEW YORK, ss.:

THEODORE GARRIS, being duly sworn, says that he is the attorney of the petitioner, Ben H. Brown, herein: That all the parties to this proceeding have been duly cited or have duly waived the issuance and service of a citation herein and consented to the entry of a decree settling the account, in the manner and form following, to wit:

I. By service of a copy of the citation issued herein upon the following persons in the manner prescribed by Sections 55 and 60 of the Surrogate's Court Act, as more fully appears by the proof of service thereof, made in the manner and form prescribed by law and filed herein on the 12th day of November, 1952, viz.:

(Name)	(When)	(Where)
NATHANIEL L. GOLDSTEIN Attorney General of the State of New York	October 29, 1952	At N.Y. State Building 80 Centre Street, New York City, New York

Appendix B

(Copy delivered to ALFRED W. JONES, Assistant Attorney General State of New York).

II. By service thereof without the State, or by publication in pursuance of an order made herein on the 6th day of October, 1952, under Sections 56, 56-a, 58-a and 59 of the Surrogate's Court Act, as more fully appears by the proof of service thereof, made in the manner prescribed by law and filed herein on the 12th day of November, 1952, viz.: On Attorney General of the State of California, and all heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of Ike Menschefrend, also known as I. Menschefrend, Ike Menschfrid, Ike Menschfried, and as Ike Menschfield, Deceased, and if they, or any of them be dead, the respective heirs at law, next of kin, devisees, legatees, distributees, grantees, assignees, creditors, lienors, trustees, executors, administrators and successors in interest of the aforesaid persons, all of whom, and whose names and places of residence are unknown to the petitioner, and cannot be ascertained after due diligence.

III. Personally or by attorney by duly executed waivers of the issuance and service of the citation of the account filed herein and a consent to the entry of a decree settling the same and filed herein on the 12th day of November, 1952, by Fidelity & Deposit Company of Maryland, 140 William Street, New York City, New York, surety.

IV. That no notice of appearance has been filed herein, except by Hon. Nathaniel L. Goldstein, Attorney General of the State of New York, by Flavius N. Costerella, Assistant Attorney General.

Appendix B

That all of the persons named above are of full age and are of sound mind, excepting those hereinbefore stated to be otherwise, and comprise all the parties, as deponent verily believes, who have any interest in this proceeding.

THEODORE GARRIS.

Sworn to before me this
30th day of June, 1953.

JAMES A. DOVRES,
James A. Dovres,
Notary Public,
State of New York.
No. 24-1007750.
Qual. in Kings Co.
Certs. filed with Bronx & N. Y. Co. Clerks.
Kings, Bronx & N. Y. Co. Registers.
Term Expires March 30, 1955.

N. B.—Where a person cited is an infant, a lunatic, an habitual drunkard, or for any cause mentally incapable adequately to protect his rights, it must so appear in the foregoing affidavit. The age of the infant must also be stated.

APPENDIX C

Surrogate's Court Act, § 164

§ 164. *Persons acting under ancillary letters must transmit assets.* The person to whom ancillary letters are issued as prescribed in this article, must unless otherwise directed in the decree awarding the letters; or in a decree made upon an accounting; or by an order of the surrogate, made during the administration of the estate; or by the judgment or order of a court of record, in an action to which that person is a party; transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the state, territory, or county, where the principal letters were granted to be disposed of pursuant to the laws thereof.